

**THIS DISPOSITION  
IS NOT CITABLE AS PRECEDENT  
OF THE T.T.A.B.**

Paper No. 16  
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8/7/00

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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Educon International  
v.  
Unisys Corporation  
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Opposition No. 108,306  
to application Serial No. 75/170,616  
filed on September 23, 1996  
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Educon International, pro se

Stephanie E. Thier of Unisys Corporation for Unisys  
Corporation  
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Before Seeherman, Quinn and Holtzman, Administrative Trademark  
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

An application has been filed by Unisys Corporation to  
register the mark TEAMPLAN for the following services

(quotation marks in original):<sup>1</sup>

Computer consultation services, namely, analyzing the  
significance of information and technology to improve  
client competitiveness and profitability, specifically  
providing "strategic information opportunity  
identification," "business and technology solutions

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<sup>1</sup> Application Serial No. 75/170,616 filed September 23, 1996 alleging  
dates of first use of October 1993.

definition," "solution justification and approval," and "program definition."

Registration has been opposed by Educon International under Section 2(d) of the Trademark Act. In the notice of opposition, opposer, appearing pro se in this matter, alleges that its own mark TEAMPLAN! "has been in continuous use in commerce since 1986." Opposer states that it was the owner of a prior registration for the same mark,<sup>2</sup> that the registration was cancelled in 1996, and that opposer has now filed a new application for the same mark. Opposer asserts that its registration "should adequately establish [opposer's] prior use and ownership of this mark" and that "[opposer's] reapplication contains specimens showing continuing use." Opposer claims that applicant's mark "is in clear conflict with [opposer's]...use of, and investment in, [opposer's] own mark...."

Opposer does not identify any goods or services in the notice of opposition and has attached a copy of its application (without accompanying specimens) to the pleading. The goods identified in the application are "books, brochures,

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<sup>2</sup> Registration No. 1,590,812 issued April 10, 1990; cancelled, Section 8 on October 14, 1996.

and seminar manuals in the field of organizational management."

Applicant, in its answer, denies the salient allegations in the notice of opposition. Applicant has also asserted affirmatively that it has used its mark since October 1993 in connection with the identified services and "is not aware of a single instance of confusion" during the four-year period of overlapping use; that its mark is used in connection with highly complex technical services rendered to sophisticated customers and that these services are unrelated to the goods of opposer.

Opposer took no testimony depositions, but on June 19, 1998, one day before the close of its testimony period, opposer filed a document styled "testimony in opposition" which consists of opposer's arguments on the merits of the case and several accompanying "exhibits." These exhibits consist of a photograph of the cover of one of opposer's manuals, a brochure describing the manuals and their contents, and a detailed statement of opposer's "long range information system plan." Opposer submitted nothing else during its testimony period.

On December 9, 1998, the Board issued an order which, among other things, acknowledged the confusing nature of this

document. The Board decided to construe the document as an "attempt to create a trial record in support of opposer's case" and in so doing, reset the time for applicant to take testimony and the time for both parties to file briefs on the case. Applicant did not take any testimony or introduce any evidence. Only opposer filed a brief on the case.

As set forth in opposer's June 19 submission, and as essentially repeated in its brief, opposer asserts use of its mark prior to applicant's claimed date of first use in 1993, and bases this claim on the issuance of its now cancelled registration and its "[prior] and continuing use from 1986 [which] has been documented...in its 1997 re-application." Opposer maintains that the marks TEAMPLAN! and TEAMPLAN are virtually identical, the only distinction being the exclamation point in opposer's mark. Opposer claims that the parties' goods and services are related, "its own strategic planning services for corporations embrace and encompass computer-specific planning services" of applicant. Opposer "acknowledges that its [mark]...applies only to the published materials that announce its mission and attract and instruct its clients" but that "these materials are a vital part of the service rendered."

The burden is on opposer, in a Section 2(d) case, to prove priority of use and likelihood of confusion. In other words,

it is opposer's obligation to come forward, not with just argument, but with sufficient proof of its allegations which would negate applicant's right to registration. See Sanyo Watch Co., Inc. v. Sanyo Electric Co., Ltd., 691 F.2d 1019, 215 USPQ 833 (Fed. Cir. 1982). Opposer has not met this burden.

First, the statements made in opposer's June 19 document were not made under oath in accordance with the applicable rules and, therefore, cannot be considered "testimony," notwithstanding opposer's characterization of the document as such. Moreover, none of the "exhibits" submitted by opposer have been properly

introduced as evidence in this case.<sup>3</sup> The written materials and photographs of opposer's manuals should have been introduced, that is, properly identified and authenticated, in connection with sworn testimony, and the copy of opposer's pending application should have been submitted in this manner or by "notice of reliance" as provided in Trademark Rule

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<sup>3</sup> With one exception which does not exist here, exhibits attached to a pleading are not evidence on behalf of the party to whose pleading they are attached unless they are thereafter, during the time for taking testimony, properly introduced in evidence as exhibits. See Trademark Rule 2.122(c).

2.122(e).<sup>4</sup> Thus, none of these materials can be considered in deciding this case.<sup>5</sup>

Even if we were to consider the exhibits which could have been submitted by notice of reliance as properly of record, it would not change the outcome of this case. That is to say, this evidence fails to establish opposer's priority and, as a result, opposer could not prevail on its likelihood of confusion claim.

The question of priority does not arise in a case where the opposer is the owner of a *valid* and *subsisting* registration for its mark. See *King Candy Co. v. Eunice King's Kitchen*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). The

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<sup>4</sup> A party may not reasonably presume evidence is of record when that evidence was not offered in accordance with the Trademark Rules. See *Original Appalachian Artworks Inc. v. Streeter*, 3 USPQ2d 1717 (TTAB 1987). Since applicant filed neither evidence nor a brief on the case, this is not a situation where it could be said that, as the result of any action or statement, applicant treated these materials as being of record. See, for example, *Original Appalachian Artworks Inc. v. Streeter*, *supra*.

<sup>5</sup> The Board, in its December 9 order, also pointed out that the document "cannot be considered by the Board" until proof of service is provided. The Board then allowed opposer time to serve a copy of this document on counsel for applicant. We note opposer's "assumption" in its brief on the case that "its testimony was admitted to the trial record upon its compliance with the Board's [service] instruction." However, the Board, in that order, made no determination as to the sufficiency of opposer's "evidence" or whether it was otherwise properly made of record. The Board does not read testimony or examine other evidence prior to final hearing. See TBMP § 502.01 and cases cited therein.

registration on which opposer seeks to rely in this case has been cancelled, and is therefore not proof of anything. Moreover, a copy of a trademark application, even properly introduced, may be used to prove only the fact that such application was filed on a certain date. It is not proof of any facts, including the dates of use, that may be alleged in the application. *Lasek & Miller Associates v. Rubin, et al.*, 201 USPQ 831 (TTAB 1978); and see, for example, Trademark Rule 2.122(b)(2).

On the record before us, opposer has failed to prove its claim of priority and likelihood of confusion.

**Decision:** The opposition is dismissed with prejudice.

E. J. Seeherman

T. J. Quinn

T. E. Holtzman  
Administrative Trademark  
Judges, Trademark Trial  
and Appeal Board